

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11**

**VANDERBILT UNIVERSITY
Employer**

**and
SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 205
Petitioner**

Case 10–RC–193205

DECISION AND ORDER

The Petitioner, Service Employees International Union Local 205, seeks to represent a unit of certain non-tenure-track faculty that the Employer, Vanderbilt University, employs at its Nashville, Tennessee, campus. The Employer makes two primary arguments: its full-time non-tenure-track faculty members are managerial employees, and thus not employees within the meaning of Section 2(3) of the Act; and the petitioned-for unit is inappropriate because the unit is not readily identifiable as a group and does not share a community of interest.

On February 16, 2017, the Union filed a petition with the Region seeking an election to become certified as the bargaining representative of certain non-tenure-track faculty at Vanderbilt University. On February 27, 2017, the first day of the hearing, Petitioner amended the petitioned-for unit to remove from the unit all non-tenure-track faculty with the titles Assistant Professor, Associate Professor, and Professor.¹ Petitioner did not explain its reasoning for seeking to exclude those faculty members. The Employer objected to this exclusion, arguing that there is no significant distinction between non-tenure-track Associate Professors, Assistant Professors, and Professors and

¹ In amending its Petition, Petitioner means to exclude faculty with the title that solely consists of Assistant Professor, Associate Professor, and Professor. It does not intend to exclude other non-tenure-track faculty in which those terms are only part of the faculty member's title, such as Adjunct Assistant Professors, Adjunct Associate Professors, Adjunct Professors; Assistant Professors of the Practice, Associate Professors of the Practice, Professors of the Practice; Visiting Assistant Professors, Visiting Distinguished Professors, Visiting Professors; and Research Assistant Professors, Research Associate Professors, Research Professors.

other non-tenure-track faculty that warrant their exclusion. Petitioner also amended the petitioned-for unit description to exclude “visiting faculty paid by entities other than Vanderbilt University.”

The parties stipulated to the visiting faculty exclusion.

As amended, the petitioned-for unit description is:

Included: All full-time and part-time graduate and undergraduate non-tenure-track faculty (including but not limited to the follow titles: Lecturers, Senior Lecturers, Principal Senior Lecturers, Instructors, Adjunct Faculty, Adjunct Instructors, Adjunct Lecturers, Adjunct Assistant Professors, Adjunct Associate Professors, Adjunct Professors, Adjunct Artist Teachers, Adjunct Senior Artist Teachers, Senior Artist Teachers, Assistant Professors of the Practice, Associate Professors of the Practice, Professors of the Practice, Mellon Assistant Professors, Visiting Faculty, Visiting Assistant Professors, Visiting Distinguished Professors, Visiting Professors, Faculty-In- Residence, Artists-In-Residence, Composers-In-Residence, Writers-In-Residence, Postdoctoral Fellows, Postdoctoral Lecturers, Research Assistant Professors, Research Associate Professors, Research Professors) employed by Vanderbilt University and currently teaching at least one course in the College of Arts and Science, Blair School of Music, Peabody College of Education and Human Development, the Divinity School, or the Graduate School.

Excluded: All tenured faculty, tenure-track faculty, all assistant professors, all associate professors, and all full professors, emeritus faculty, research faculty who are not teaching courses, adjunct faculty, clinical faculty, the School of Medicine faculty, the School of Nursing faculty, the Law School faculty, the Owen Graduate School of Management faculty, the School of Engineering faculty, all administrators (including deans, directors, provosts, and chairs who may have teaching assignments); faculty who are paid by entities other than Vanderbilt University (including governments, and other organizations), visiting faculty paid by their home institutions, athletic coaches, all other employees employed by the University, including those who teach a class or course and are separately compensated for such teaching, managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

A hearing officer for the National Labor Relations Board held a hearing in this matter and the parties submitted briefs. Based on the record and relevant Board law, I find that the full-time non-tenure-track faculty are not managerial employees and are therefore employees within the meaning of Section 2(3) of the Act. I also find that the petitioned-for unit is not readily identifiable as a group

and is therefore inappropriate. However, I also find that separate units based on the non-tenure-track faculty's primary school appointments are readily identifiable as a group and share a sufficient community of interest so as to be appropriate units for the purposes of collective bargaining. Accordingly, I am directing an election in four separate units that the record establishes are appropriate.²

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then provide my legal analysis of the issues presented, including why I conclude that Petitioner's full-time non-tenure-track faculty members are not managerial employees are, instead, employees within the meaning of Section 2(3) of the Act, and why I conclude that the petitioned-for unit is inappropriate, but that four units based on the non-tenure-track faculty's primary school appointments is appropriate.

I. OVERVIEW OF OPERATIONS

The Employer is a private university with an approximately 330-acre campus in Nashville, Tennessee. The University employs 1,727 faculty to teach approximately 13,000 undergraduate, graduate, and professional students. The University is composed of 10 individual schools. Five of those schools are in the petitioned-for unit: the College of Arts and Science, the Blair School of Music, Peabody College of Education and Human Development, the Divinity School, and the Graduate School. The schools excluded from the petitioned-for unit are the School of Engineering, the Law School, the School of Medicine, the School of Nursing, and the Owen Graduate School of Management.

² As discussed below, this direction of election for each of the four units is subject to Petitioner demonstrating administratively that it has a sufficient showing of interest for each of these units. As also explained below, I am not directing an election among faculty at the Graduate School as no faculty have a primary appointment to that school.

a. THE FACULTY

Faculty have a primary appointment to one of the University’s schools, except the Graduate School, to which no faculty have a primary appointment.³ The Employer maintains two critical classifications of faculty — tenured and tenure-track faculty and non-tenure-track faculty. Approximately 56 percent of faculty in the petitioned-for schools are non-tenure-track, and 44 percent are tenured or tenure-track.

The evidence shows there are two types of non-tenure-track faculty, adjunct non-tenure-track faculty and “regular” non-tenure-track faculty.⁴ Adjunct non-tenure-track faculty are an overwhelming majority of the petitioned-for unit. Generally, an adjunct’s primary employment is outside of the University and academia, and the adjunct may be hired on one-semester renewable contracts to teach one or two specific courses. Adjunct faculty are part-time and do not qualify for health insurance benefits. Regular non-tenure-track faculty can be either full-time or part-time and serve a one-, three-, or seven-year renewable contract depending on rank and seniority.

The critical distinction between tenure and tenure-track faculty and non-tenure-track faculty is the availability of tenure. The Employer hires faculty as either tenure-track or non-tenure-track. Tenured faculty have a permanent appointment for an indefinite period; the Employer may discharge them only for cause, and they have the right to a hearing prior to discharge. Tenure-track faculty must obtain tenure within seven years of being hired. As is clear by their title, non-tenure-track

³ For example, a Political Science faculty member who teaches graduate-level political science courses would have his or her primary appointment in the College of Arts and Science and a secondary appointment in the Graduate School.

⁴ There does not appear to be a formal designation for non-adjunct non-tenure-track faculty, so I will refer to them as Regular non-tenure-track faculty for purposes of this brief discussion. I use “non-tenure-track” to refer to both Regular non-tenure-track and Adjunct non-tenure-track faculty collectively.

faculty are not eligible for tenure. The Employer hires non-tenure-track faculty for specific terms. Although the Employer may remove them only for cause mid-contract, the Employer may exercise its discretion in choosing not to renew, or to offer a new contract to, non-tenure-track faculty when their contracts expire. A non-tenure-track faculty member cannot become tenure-track without applying for, and the Employer selecting the individual for, an open tenure-track position. The evidence establishes that a non-tenure-track faculty member would not have any advantage over an outside applicant for a tenure-track position.

The primary functional distinction between tenure-track and non-tenure-track faculty is the role of research and scholarship in the position. The Employer hires non-tenure-track faculty primarily to teach courses. They may spend between 10 and 20 percent of their work time on research and scholarship, if at all. The Employer expects tenured and tenure-track faculty to split their time evenly between teaching and research.

b. ORGANIZATIONAL STRUCTURE

The University operates, essentially, a federal system. The University sets policies that apply to the University at-large. However, each individual school also maintains its own leadership, policies, governing faculty committees, and in some cases, its own constitution and policies.

i. University-Wide Organizational Structure

The University's governance is vested in its Board of Trust which is composed of 29 members and the Chancellor, none of whom are faculty. The Board of Trust must approve all major academic, personnel, and financial decisions, including all faculty or personnel appointments, such as appointment or promotions to tenure; financial decisions concerning the University's operating budget; additions and changes in schools, departments, or degree programs; and naming University buildings and spaces. The Board of Trust also selects the Chancellor, who serves as the Chief

Officer of the University. The Provost reports directly to the Chancellor, and ten Vice Chancellors report directly to the Provost.

All University faculty are subject to the terms and conditions of employment set forth in the Faculty Manual. The Faculty Manual is essentially the faculty employee handbook. The Chancellor, the Provost, or the Chair of the Faculty Senate may propose amendments to the Faculty Manual. Although the faculty have some input over changes to the Faculty Manual through the Senate Chair, the Chancellor has the ultimate decision whether to approve any proposed changes to the manual and, by extension, to employee terms and conditions of employment.

The Faculty Senate is a deliberative body that represents the faculty and makes recommendations to the Chancellor and the Board of Trust. The Faculty Senate meets monthly and acts primarily through its eight standing committees and its ad hoc committees and task forces. According to the Faculty Manual, only full-time faculty with titles of Instructor or above may be elected to the Faculty Senate. Thus, all tenured and tenure-track professors, non-tenure-track Professors of the Practice, and non-tenure-track Research Professors are eligible to serve on the Faculty Senate. Although non-tenure-track Professors of the Practice and non-tenure-track Research Professors are in the petitioned-for unit and eligible to serve on the Faculty Senate, no petitioned-for faculty currently sit on the Faculty Senate or Senate standing committees.

The Employer also maintains over 50 Provost Committees, which may take the form of a committee, working group, or task force. These committees consider University-wide matters. Each Provost Committee has a specific charge and mission. Some are indefinite and some have a specific goal and are then disbanded. None of the Provost Committees are responsible for setting budgets or tuition. Provost Committees are intended to be deliberative bodies, generally operating through consensus. There are approximately 800 seats available on the current Provost Committees that can

be filled by any faculty member, administrator, staff, or students. Eleven petitioned-for faculty currently sit on nine Provost Committees. Petitioned-for faculty do not make up a majority of any Provost Committee.

ii. The Petitioned-For Schools

1. The College of Arts & Science

The College of Arts and Science is the University's largest school, with over 4,000 undergraduate students, almost 800 graduate students, 79 tenured and tenure-track faculty, and 255 non-tenure-track faculty. The school itself is spread across several buildings in the University's Central Campus area. The College of Arts and Science offers undergraduate and graduate level courses. Dean Laura Benton heads the College and she has been the Dean since July 2015. School faculty are organized into three Divisions – Humanities, Sciences, and Social Sciences – and further subdivided into discipline-specific Departments, such as Political Science. Each Division has its own Dean, and each Department has its own Department Chair.

The College of Arts and Science has its own constitution and Faculty Council that includes 12 elected faculty, and the Dean of the College. The Chancellor and the Dean of the Graduate School also sit on the Faculty Council as non-voting, members. The Faculty Council considers academic and educational matters and advises the Dean accordingly. Only tenured and tenure-track faculty can serve as Faculty Council members. There are 14 College of Arts and Science faculty committees. The Dean, in consultation with the Faculty Council, appoints members to these committees. All of the committees in this College have at least one administrator member, and students serve on several of the committees. There are currently 89 faculty serving on committees, only four of whom are in the petitioned-for unit. Petitioned-for faculty do make up a majority of any committee.

The College of Arts and Science faculty generally enjoy the same benefits as is provided to all other University faculty. While the University's policy is to offer health insurance only to full-time employees, there is evidence that the College of Arts and Science allows some faculty to keep their health insurance benefits if the Employer assigns them a lesser course load and have to go to part-time employment. The College of Arts and Science allows only tenured and tenure-track faculty to take sabbaticals. A sabbatical is a paid leave for the faculty member to pursue academic interests, such as research, outside of the University. While on sabbatical, the faculty member may elect to receive either their full pay for one semester or half pay for two semesters.

2. The Peabody College of Education and Human Development

There are approximately 2,100 students in the Peabody College of Education and Human Development, 85 tenured and tenure-track faculty, and 141 non-tenure-track faculty. The Peabody College of Education and Human Development offers undergraduate, graduate, and professional level courses. Part-time non-tenure-track faculty teach undergraduate and professional courses, but not graduate-level courses. The school is spread over several buildings in the southeastern area of campus known as The Commons. Dean Camilla Benbow has been Dean of the Peabody College for the last 19 years. The Peabody College is divided into five departments, each with a Department Chair. The Dean appoints Department Chairs for five-year terms.

The Peabody College has its own constitution and Faculty Council. The Faculty Council includes ten elected faculty members and the Dean, who is a non-voting member. None of the petitioned-for faculty have served on the Faculty Council in the last three years. The Faculty Council Chair selects members for the nine standing faculty committees at the Peabody College. There are over 60 committee seats available, and only seven petitioned-for faculty currently sit on any committee. Of those nine committees, petitioned-for faculty hold a majority on only one, the

Committee on Academic Standards and Procedures. Since the 2014 to 2015 academic year, that is the only committee that has ever held a majority of petitioned-for faculty.

There was evidence that the Peabody College allows some of its faculty to keep their health insurance benefits if the Employer assigns them a lesser course load, and they have to go to part-time employment. At Peabody, tenured, tenure-track, and full-time non-tenure-track faculty are eligible for sabbatical. Part-time non-tenure-track faculty are not eligible for sabbatical.

3. The Blair School of Music

There are approximately 200 undergraduate students, 30 tenured and tenure-track faculty, and approximately 102 non-tenure-track faculty in the Blair School of Music. In addition to instructing its music majors, Blair faculty also teach approximately 1000 non-music-major students annually in its elective courses. The Blair School of Music does not offer graduate or professional level courses. The School also provides pre-collegiate and adult music instruction and education courses for the public. The Blair School is located within its own facility in the southwest area of campus. Dean Mark Wait has been the Dean at Blair since 1993. The School is divided into departments, each with its own Department Chair. There are two types of departments — performance-based and academic-based. Performance-based departments are organized by instrument type (e.g. Brass, Strings, Woodwinds, etc.) There are three academic-based departments: Theory and Composition, Musicology and Ethnomusicology, and Musicianship.

The Blair School has its own faculty handbook that sets terms and conditions of employment beyond those contained in the University's Faculty Handbook. Blair does not have its own faculty council, but faculty do participate in 23 school-wide committees. All Blair faculty are eligible to serve on committees. The Dean appoints faculty to committees. Only 13 petitioned-for faculty

currently sit on Blair committees, and petitioned-for faculty do not make up a majority of any of the school's committees.

The Blair School's tenured, tenure-track, and full-time non-tenure-track faculty are eligible for sabbaticals, part-time non-tenure-track faculty are not. Blair's full-time faculty, including full-time non-tenure-track faculty, enjoy two benefits unique to the school: All full-time faculty are eligible for up to \$1,000 each in travel support for professional purposes each year, and all full-time faculty receive a 50 percent discount on pre-collegiate music instruction for their children.

4. The Divinity School

The Divinity School is the University's smallest school, both in terms of enrollment and faculty. There are approximately 270 Divinity-School students, 21 tenured and tenure-track faculty, nine full-time non-tenure-track faculty, and seven part-time non-tenure-track faculty. The Divinity School offers only graduate and professional level courses; it does not offer any undergraduate courses. The Divinity School is located within its own building in the Central Campus area. Dean Emilie Townes has been the Dean of the Divinity School since July 2013. Divinity School faculty are divided into 12 Areas, each with its own Area Director.

The Divinity School has its own faculty manual. There is one elected committee, the Faculty Committee on Personnel and Policy, which handles personnel matters such as performance reviews, tenure and promotion, and new hires. Only full-time tenured or tenure-track faculty are eligible to sit on that committee and to vote for its representatives. Of the petitioned-for schools, the Divinity School is unique in that all full-time faculty, including non-tenure-track faculty, are required to serve on a school committee, due to the school's small size. Dean Townes assigns faculty to one of Divinity's 11 committees every year. Only four petitioned-for faculty currently sit on any committee

and petitioned-for faculty do not make up a majority of any committee. Only full-time tenured, tenure-track, and non-tenure-track faculty are eligible for sabbatical.

5. The Graduate School

The evidence in the record regarding the Graduate School is extremely limited. However, the unrebutted evidence shows that no faculty have a primary appointment in the Graduate School. Rather, faculty members who teach graduate-level courses have a primary appointment in the school in which their subject is taught and a secondary appointment in the Graduate School. For example, a faculty member who teaches graduate-level Political Science courses would have a primary appointment in the College of Arts and Science and a secondary appointment in the Graduate School.

iii. The Excluded Schools

The parties only offered minimal evidence concerning the excluded schools. The excluded schools are the School of Nursing, the Medical School, the Owen Graduate School of Management, the Law School, and the School of Engineering. All of the excluded schools are professional and graduate schools, with the exception of the School of Engineering, which is an undergraduate-level school.

II. ANALYSIS

This case presents two primary issues. First, whether the full-time petitioned-for non-tenure-track faculty are managerial due to their participation in university and school committees and governance. Second, whether the petitioned-for unit is readily identifiable as a group and appropriate for the purposes of collective bargaining.

a. NO MEMBERS OF THE PETITIONED-FOR UNIT ARE MANAGERS

The Employer argues that its full-time non-tenure-track faculty exercise managerial authority by participating in University and school governance and committees. Petitioner argues that the facts do not support the Employer’s contention and that full-time non-tenure-track faculty, like the other petitioned-for non-tenure-track faculty, are not managerial.

i. The Yeshiva and Pacific Lutheran Framework

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court held that faculty at Yeshiva University were managerial employees and therefore excluded from the protections of the Act, including, most relevantly, the right to join a labor union. “Managerial employees are defined as those who ‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’” *Id.* at 682 (1980), quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). “[Managerial] employees are much higher in the managerial structure than those explicitly mentioned by Congress which regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.” 444 U.S. at 682 “Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *Id.*

Over the next three decades the Board issued nearly two dozen decisions involving college and university faculty organizing and whether or not those faculty were managerial employees under the Act. *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 15 fn. 30 (2014). In the immediate post-*Yeshiva* era (or at least until 2014), the Board considered any and all factors presented by the parties as indicative of managerial status. See *id.* at 17 fn. 34. After decades of experience deciding managerial questions in the faculty setting, the Board clarified and narrowed the scope of the inquiry in *Pacific Lutheran University*. *Id.* at 17 fn. 34.

In *Pacific Lutheran*, the Board established five factors indicative of the managerial status of college and university faculty. *Id.* at 17-18. The Board found that three of these decision-making areas – academic programs, enrollment management, and finances – are primary areas of decisionmaking and therefore more important than the other two areas. *Id.* The other two secondary areas of decision making are academic policy and personnel policy and decisions. *Id.*

The *Pacific Lutheran* Board also reasoned that, “In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations.” *Id.* at 18. Both in *Pacific Lutheran* and in subsequent cases, the Board reaffirmed that, when the Employer’s position is that faculty exercise authority through participation in committees, the petitioned-for faculty will not be found to have authority unless the Employer shows that the petitioned for faculty exert majority control in those committees. *University of Southern California*, 365 NLRB No. 11 (2016) (Board upholds Regional Director’s determination that the Employer failed to show that the petitioned-for unit was the majority on governance committees); *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 18, fn. 36, citing *University of Great Falls*, 325 NLRB 83, 95 (1997)); *Cooper Union of Science and Art*, 273 NLRB 1768, 1775 (1985) (“[F]ull time faculty (bargaining unit) members constitute a numerical minority of most of the governance committees and constitute something less than a voting majority on about half of them”).

ii. Analysis of the Managerial Issue

The “majority rule” principle of faculty governance is, in this case, the best starting place for determining whether full-time non-tenure-track faculty exercise managerial control. Over nearly three weeks of testimony, the Employer introduced evidence concerning hundreds of university and school-level committees. Of all of those committees, in only one, the Peabody College of Education

and Human Development’s Committee on Academic Standards and Procedures, did the petitioned-for faculty constitute a majority of the members of the committee. Based on the majority-rule principle, the fact that petitioned-for employees are on any committee other than the Peabody’s Committee on Academic Standards and Procedures is not indicative of managerial status because the petitioned-for faculty on those committees do not exercise managerial control or make effective recommendations.

Because they do not make up a majority of these committees, non-tenure-track faculty cannot exercise managerial control or make effective recommendations by participating on these committees. Theirs are but one or two voices on any given committee. Because they lack managerial control and cannot make effective recommendations on University policy or governance, there is no danger that their loyalty will be divided between the Union and the Employer. See *Yeshiva*, 444 U.S. at 682 (“[A]n employer is entitled to the undivided loyalty of its representatives.”).

I also reject the Employer’s argument that all full-time non-tenure-track faculty are managerial because committee membership changes year-to-year. The Employer argues that although there may be a minority of petitioned-for faculty on a committee one year, the makeup of that committee may change substantially in the future, so that full-time non-tenure-track faculty do represent a majority on a managerial committee. Assuming that this is a valid concern, the Employer has the burden of showing that full-time non-tenure-track faculty are managerial, and the Employer did not put on sufficient evidence to establish its theory of revolving-door managers.

Since nearly every committee for which evidence was introduced is excluded from consideration by application of the Board’s majority rule principle, only Peabody College of

Education and Human Development’s Committee on Academic Standards and Procedures remains as a potential indicator of managerial authority of full-time non-tenure-track faculty.

Dean Benbow testified that the Committee on Academic Standards and Procedures considers the standards for academic work, graduation, and grading. One example of this committee’s work was to recommend the Immersion Vanderbilt program be instituted at the Peabody College. The Immersion Vanderbilt program required that students complete a substantial project to graduate, including study abroad or research programs. This committee also recommended that Peabody drop the “A-plus” grade and revise its graduation honors criteria (for magna cum laude, summa cum laude, and cum laude) in order to bring the Peabody College in line with the University’s other schools. This is a five-member committee with three petitioned-for faculty comprising the majority. This committee makes recommendations to the Peabody College’s Faculty Council, which then votes on these matters. Once Peabody’s Faculty Council approves a committee recommendation, the matter is sent to Peabody’s Dean for approval or rejection.

Determining whether membership on this committee indicates whether the petitioned-for faculty are managerial employees requires application of the *Pacific Lutheran* five factor test. As a preliminary matter, I reject the Employer’s arguments that every single faculty committee necessarily touches on one of the *Pacific Lutheran* factors. The *Pacific Lutheran* Board was clear that its intent was to narrow and focus the scope of the inquiry from the all-encompassing inquiry of the post-*Yeshiva* era. *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 17 fn. 34 (2014) (“In accordance with the D.C. Circuit’s instruction [. . .] we have consolidated the numerous areas of decision-making into a much more manageable five.”).

Therefore, in order to show that its full-time non-tenure-track faculty are managerial, the Employer must show that the Peabody Committee on Academic Standards and Procedures exercises

decision-making authority in: 1) academic programs; 2) enrollment management; 3) finances; 4) academic policy; or, 5) personnel policies and decisions. The Employer did not introduce any evidence indicating that this committee exercises authority in matters of finance, enrollment management, or personnel policies and decisions. Rather, the evidence indicates that this committee may exercise authority in regard to matters of the primary area of academic programs and the secondary area of academic policy. *Pacific Lutheran* draws a fine, but important, line between these two decisionmaking areas.

The Board defined the primary area of academic programs as “cover[ing] topics such as the university’s curricular, research, major, minor, and certificate offerings and the requirements to complete successfully those offerings.” *Pacific Lutheran*, 361 NLRB No. 157, slip op. at 17 (2014). The area of academic programs, “effectively determine the university’s ‘product’ and the terms upon which that ‘product’ is offered to its students.” *Id.* “Thus, this decision-making area will necessarily involve consideration of organizational and structural changes.” *Id.*

In contrast, the secondary decision-making area of academic policy “covers topics such as teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy.” *Id.* “While determinations of academic policy apply more broadly than the faculty’s classroom or research project, they tend to be crafted more generally, giving the faculty latitude within their individual classrooms or research projects.” *Id.*

The recommendation of this committee to adopt the Immersion Vanderbilt program appears to be an exercise of decisionmaking authority within the academic programs area, as it adds a new graduation requirement, or in other words, “the terms upon which [the] ‘product’ is offered to its students.” *Id.* On the other hand, there is no evidence that the Peabody College of Education and Human Development’s adoption of the Immersion Vanderbilt program required consideration of

“organizational and structural changes” to the University, as required by *Pacific Lutheran*. The other examples of matters considered by this committee, dropping the “A-plus” grade and modifying graduation honors, fall more in line with the secondary area of academic policy, as they are matters of grading policy.

iii. Committee on Academic Standards and Procedures to Vote Subject to Challenge

There is insufficient evidence from which I can conclude that members of the Peabody College of Education and Human Development’s Committee on Academic Standards and Procedures exercise sufficient authority so as to make them managerial employees. Therefore, I am ordering that the three petitioned-for employees in this committee shall vote subject to challenge.

b. APPROPRIATE UNIT DETERMINATION

The Employer next argues that the petitioned-for unit is inappropriate as it is not readily identifiable as a group, and the petitioned-for unit does not share a sufficient community of interest under *Specialty Healthcare*, 357 NLRB 934 (2011).⁵ Petitioner argues that the petitioned-for unit is readily identifiable as a group and shares a sufficient community of interest. For the reasons explained below, I find that the petitioned-for unit does is not readily identifiable as a group.

⁵ While I believe that *Specialty Healthcare* provides an appropriate framework for determining whether a unit limited to only four of the university’s ten schools is appropriate, the Employer did not take a position on which unit would be appropriate and thus does not explicitly contend that employees from more or all of its schools must be included in the unit. This may be due to its overriding position, which I have rejected, that its non-tenured-track professors are not statutory employees. However, by observing that Petitioner did not seek additional schools or an additional class of schools (all undergraduate, for example), the Employer has made an argument analytically akin to the classic *Specialty Healthcare* scenario where an employer asserts that a specific group of employees must be included in the unit to create the smallest appropriate unit. The Employer has consistently argued that application of *Specialty Healthcare* is appropriate in its pre-hearing position statement as well as in its post-hearing brief.

However, by splitting the petitioned-for unit into its component schools, there are alternate units that I find to be readily identifiable as a group and which share a sufficient community of interest.

i. The Specialty Healthcare Framework

In *Specialty Healthcare*, the Board set forth the standard for determining an appropriate bargaining unit in cases in which a party contends that the smallest appropriate bargaining unit must include additional employees beyond those in the petitioned for unit. *Specialty Healthcare*, 357 NLRB 934; see also *Macy’s Inc.*, 361 NLRB No. 4 (2014). “When a union seeks to represent a unit of employees ‘who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned for unit to be an appropriate unit. . . .’” *Macy’s*, 361 NLRB No. 4, slip op. at 7, quoting *Specialty Healthcare*, 357 NLRB at 945. The burden is therefore on Petitioner to show that the petitioned-for unit is readily identifiable as a group and shares a community of interest.

The Board recognizes there may be multiple appropriate ways to organize employees for collective bargaining purposes. *Overnight Transportation*, 322 NLRB 723 (1996). The Act requires only that the appropriate unit be *an* appropriate unit, it does not have to be the only appropriate unit or the most appropriate unit. *Specialty Healthcare*, 357 NLRB at 939 fn. 11. However, a bargaining unit based on arbitrary groupings of employees is inappropriate. *Moore Business Forms*, 204 NLRB 552 (1973).

A unit is appropriate if the employees in the unit share a community of interest. *Specialty Healthcare*, 357 NLRB at 942. The Board uses a multi-factor review to determine whether the petitioned-for employees share a community of interest. These factors include: departmental organization; similarity of skills and duties; similar terms and conditions of employment; similar

wages, and benefits; a common or separate supervisor; interchange and contact with other employees in the unit; and functional integration with the Employer’s other employees. *Id.*

Once the petitioner establishes that the petitioned-for unit is appropriate, the burden shifts to the party contending that a larger unit would be more appropriate to show that the larger unit shares an “overwhelming community of interest” with the petitioned-for unit. *Id.* at 945-46.

ii. The Petitioned-For Unit Is Not Readily Identifiable as a Group

Petitioner argues that petitioned-for unit is appropriate under *Specialty Healthcare*. However, Petitioner failed to put on sufficient evidence demonstrating how the petitioned-for unit is readily identifiable as a group. The inclusion and exclusion of schools in the petitioned-for unit appears to be arbitrary. I find that the petitioned-for unit is not readily identifiable as a group for the reasons stated below.

The petitioned-for unit includes certain full-time and all part-time non-tenure-track faculty with their primary appointment in one of five of the University’s schools: College of Arts and Science, Peabody College of Education and Human Development, Blair School of Music, Divinity School, and the Graduate School. The petitioned-for unit excludes faculty at the other five schools: the Law School, the Medical School, the School of Nursing, the Owen Graduate School of Management, and the School of Engineering.

Petitioner failed to put on evidence demonstrating how the faculty at the petitioned-for schools are readily identifiable as a group distinct from the excluded schools. All of the petitioned-for schools offer graduate and professional-level courses, with the exception of the School of Engineering, which is an undergraduate school. There is a history of cases demonstrating that excluding faculty at professional-level schools is appropriate for a variety of reasons. See *University of Miami*, 213 NLRB 634 (1974); *Syracuse University*, 204 NLRB 641 (1973); *Fordham University*, 193 NLRB 134 (1971). Even assuming that the professional schools were correctly excluded, which

I am unable to do due to the lack of evidence concerning the excluded schools, there is insufficient evidence as to why Petitioner excluded the School of Engineering, an undergraduate school, from the petitioned-for unit.

In its brief, Petitioner raised a number of arguments as to how the petitioned-for unit is readily identifiable as a group. However, none of these arguments are persuasive. Petitioner argues that all of the petitioned-for faculty work on the same campus. However, the evidence shows that *all* of the Employer's schools are located on the same Nashville campus, including the excluded schools. Therefore, the argument that the petitioned-for faculty are readily identifiable as a group because they all work on the same campus is without merit since *all* of the Employer's faculty, including non-tenure-track faculty in the excluded schools, work on the same campus.

Petitioner raises a number of areas that the petitioned-for schools have in common. However, the evidence shows that these areas would apply to all of the University schools, including the excluded schools. Petitioner argues that the University maintains centralized policies and procedures that govern the petitioned-for schools, and therefore the petitioned-for faculty are readily identifiable as a group. Yet again, the evidence tends to show that all of the schools, including the excluded schools, share those same university-wide policies. Therefore, there is nothing in those University-wide policies and procedures that separate the faculty at the excluded schools from the faculty in the petitioned-for schools. Similarly, Petitioner argues that the petitioned-for schools share the same University-wide human resources policies and administration, and therefore the petitioned-for faculty are readily identifiable as a group. However, the evidence suggests that the excluded schools would also be subject to those same human resources policies and administration. Petitioner makes the same type of argument with respect to the petitioned-for faculty's job titles, and again, the evidence demonstrates that faculty in the excluded schools would have the same job titles as those in the petitioned-for schools. Petitioner also argues that the petitioned-for schools all have budgets set

by the Chancellor, but the evidence shows that the excluded schools also have budgets set by the Chancellor.

I also reject Petitioner’s contention that the Employer did not argue that the faculty members in the petitioned-for unit are not sufficiently distinct from faculty members at the excluded schools and that the Employer failed to offer evidence showing that the petitioned-for unit is not readily identifiable as a group. In its pre-hearing position statement, throughout the hearing, and in its post-hearing brief, the Employer made clear that its position was that Petitioner had improperly “gerrymandered” the petitioned-for unit to include the schools where Petitioner had the most support and exclude those where it lacked support. It was Petitioner’s burden, not the Employer’s, to establish that the petitioned-for unit is readily identifiable as a group.

In all of its evidence and argument, Petitioner has failed to demonstrate what sets the faculty at the petitioned-for schools apart from the excluded schools, which is the very essence of the inquiry into whether the petitioned-for unit is readily identifiable as a group. However, as explained in greater detail below, the evidence clearly demonstrates that four units of the Employer’s non-tenure-track faculty, one for each school, are readily identifiable as a group and share a sufficient community of interest.

iii. **Four Separate Units Based on Primary School Appointment Are Readily Identifiable as a Group**

Although I find that the petitioned-for unit is inappropriate because it is not readily identifiable as a group, Petitioner has taken the position that I may order an election in any alternative unit I find to be appropriate. As discussed below, I find that the petitioned-for faculty in four of the five schools is distinctly appropriate — **the College of Arts and Science, the Divinity School, the Blair School of Music, and the Peabody College of Education and Human Development**. Accordingly, I am ordering an election in each of these four units subject to

Petitioner demonstrating administratively to the Region that it has an adequate showing of interest in each unit.

I do not, however, find that a unit comprised of the non-tenure-track faculty in **the Graduate School** is appropriate. I have concluded above that separate units based on the non-tenure-track faculty's primary appointment is appropriate. Unlike the other nine schools at the University, the Graduate School has no faculty who are primarily assigned to the school. Faculty are assigned to the Graduate School as a secondary appointment. As in the case of a Political Science non-tenure-track faculty member who teaches graduate-level political science courses, the example used above, that faculty member's principal assignment is to the College of Arts and Science; the faculty member's assignment to the Graduate School is only secondary. If otherwise eligible to vote, that faculty member would vote in the College of Arts and Science unit. If I were to find a separate unit of faculty at the Graduate School to be appropriate, the faculty member would be potentially eligible to vote in both the College of Arts and Science unit *and* the Graduate School unit. For all of the reasons that faculty at each of the other petitioned-for schools and colleges share a community of interest, the proper placement for faculty at the Graduate School is the school where they are primarily appointed.

While grouping the five petitioned-for schools into a single unit is inappropriate because there is insufficient evidence to show that non-tenure-track faculty at the five schools are readily identifiable as a group distinct from the faculty at the excluded schools, the petitioned-for faculty within each of the four schools⁶ constitute a readily identifiable group that shares a community of interest.

⁶ The College of Arts and Science, the Divinity School, the Blair School of Music, and the Peabody College of Education and Human Development.

The evidence demonstrates that the petitioned-for faculty at each school is readily identifiable as a group. The petitioned-for faculty at each school share non-tenure-track job classifications, are all in the same department as that term is colloquially understood, have offices and teach courses in the same areas of campus, and share the same types of skills as others in their respective schools.

First, nearly all of the petitioned-for faculty have job titles that are from the pool of non-tenure-track job titles in the University's Faculty Manual. The Employer argues that, in some cases, there are not many functional distinctions between full-time tenured and tenure-track faculty and full-time non-tenure-track faculty. However, this argument lacks merit. Tenure is a significant benefit for tenure and tenure-track faculty that is completely unavailable to non-tenure-track faculty. It also determines, in certain schools, eligibility for certain assignments and benefits. There are also several other important distinctions between non-tenure-track faculty generally and the other faculty as well. Tenured and tenure-track faculty are expected to spend up to 50 percent of their time on research and scholarship, as opposed to non-tenure-track faculty who have no such expectation. Non-tenure-track faculty also are not eligible for tenure without applying separately for an available tenured position with no advantage over applicants off the street. The Board has never required that included and excluded employees be completely distinct from each other, and it is natural that included job classifications may share some characteristics with excluded job classifications. The distinction between the non-tenure-track job classifications and tenured and tenure-track job classifications is significant enough to make non-tenure-track faculty readily identifiable as a group.

However, the petitioned-for unit excludes faculty holding the titles of Assistant Professor, Associate Professor, and Professor.⁷ In the Faculty Manual, the titles of Associate Professor and

⁷ The original petitioned-for unit included non-tenure track faculty with these titles, but Petitioner amended its petition on the first day of the hearing to exclude these titles. As will be discussed in greater detail, Petitioner failed to put on evidence or explain why it has sought to exclude these non-tenure track faculty.

Professor are titles for tenured professors but may be used by individual schools for non-tenured positions. The title of Assistant Professor may be used for both tenure-track faculty and non-tenure-track faculty. The evidence shows that there are a small number of non-tenure-track Associate Professors, Assistant Professors, and Professors within the Blair School of Music, the Divinity School, and College of Arts and Science. There is no evidence that there are any non-tenure-track faculty that hold these titles in the Peabody College of Education and Human Development. In its brief, the Employer argued that there is nothing specifically distinct about non-tenure-track Associate Professors, Assistant Professors, or Professors as opposed to the other non-tenure-track faculty. In fact, there is no evidence in the record as to what might set non-tenure-track faculty with these titles apart from other non-tenure-track faculty. For that reason, non-tenure-track Associate Professors, Assistant Professors, and Professors in each school shall vote subject to challenge.

Next, the non-tenure-track faculty in each school are, essentially, all in the same “department.” While the Employer may subdivide each school into its own “divisions”⁸ each school is essentially a “department” of the Employer’s operation as that term is colloquially used. In *Macy’s*, the Board found that a separate unit of cosmetics and fragrances employees at a department store constituted an appropriate unit, in part because the petitioned-for employees were all contained in a separate department. 361 NLRB No. 4. Like the cosmetics and fragrances employees in *Macy’s*, the Employer has drawn a departmental line separating each school from the others by instituting separate employee policies, responsibilities, and supervisors at each school. See *id.*, slip op. at 8. Therefore, the evidence demonstrates that non-tenure-track faculty in each school are readily identifiable as a group.

⁸ The College of Arts and Science, for example, is divided into three Divisions, Humanities, Sciences, Social Sciences, and then further subdivided into “divisions,” such as Political Science.

Next, non-tenure-track faculty at each school are located in the same general areas on campus. The Blair School of Music and the Divinity School each have their own buildings separate and apart from the rest of the University. The Peabody College of Education and Human Development and the College of Arts and Science's offices and classrooms are spread over a number of buildings, but it is undisputed that the Peabody College and the College of Arts and Science faculty offices and classrooms are located in the same general areas of campus. Of the excluded schools, the School of Nursing, the Law School, the School of Engineering, and the Owen Graduate School of Management are each located in their own building and the Medical School's facilities are located within the Vanderbilt Medical Center. Although some faculty may occasionally teach courses in buildings outside of their school's primary location, the evidence demonstrates that each school's faculty are overwhelmingly grouped in locations based on the school in which they teach. Therefore, the "work locations" factor indicates that the non-tenure-track faculty of each school are readily identifiable as a group.

Finally, the evidence shows that the faculty of each school shares similar skills distinct from other schools, namely, the skill to teach classes in that school. The evidence shows that at each school if a faculty member were to be unable to teach his or her class for an extended period, the school would look for other faculty within that school to teach the class, and then look outside the University for an adjunct to be brought in to teach the course. There was no evidence that faculty from another of the University's schools would be brought in to teach the course. Logically this makes sense. You would not want a Political Science non-tenure-track faculty member from the College of Arts and Science teaching a Woodwinds course at Blair School of Music, or vice versa. This evidence of employee skills and interchange demonstrates that the faculty within each school is readily identifiable as a group separate from the other schools.

Based on the foregoing, I find that the petitioned-for faculty are not readily identifiable as a group. However, I find that by separating the non-tenure-track faculty into separate units based on their primary school appointments, and including the Employer's entire non-tenure-track faculty into those units, four school-based units are readily identifiable as a group.

iv. The Four Units Based on School Appointment Share a Community of Interest

For the reasons below, I find that the non-tenure-track faculty within each school share a community of interest, such that the non-tenure-track faculty at each school is an appropriate unit for collective bargaining. Again, the Board uses the multi-factor review to determine whether the petitioned-for employees share a community of interest; these factors include: departmental organization; similarity of skills and duties; similar terms and conditions of employment; similar wages, and benefits; a common or separate supervisor; interchange and contact with other employees in the unit; and functional integration with the Employer's other employees. *Specialty Healthcare*, 357 NLRB at 942.

Some of the factors the Board considers when determining whether a bargaining unit is appropriate overlap with the factors in determining whether a unit is readily identifiable as a group; namely, shared departments, similarity of skills and duties, and employee interchange. I discussed these factors in full above in my discussion of a readily identifiable group. In light of the above and the record as a whole, I find that the factors of shared departments, similarity of skills and duties, and employee interchange favors including all non-tenure-track faculty in different units based on primary school appointment. I discuss the remaining community of interest factors in turn, below.

1. Common Supervisors

It is also clear from the record that the faculty in each school have common supervisors. All faculty report directly to either a Department Chair, Program Director, or Area Director depending

on the school. The Department Chair, Program Director, or Area Director reports to that school's Dean, the Dean reports to the University Provost, and the Provost reports to the Chancellor. Thus, each school has two levels of localized supervision — Department Chair, Program Director, or Area Director, and the school's Dean, before a matter would be elevated to the University level. Both administrators and non-tenure-track faculty testified that Department Chair or Dean within the school would handle performance concerns or difficulties with faculty within the school. No one at the University level would typically become involved in these issues.

In light of the above, and the record as a whole, I find that the supervisory structure favors including faculty in units based on primary school appointment.

2. Wages and Benefits

The non-tenure-track faculty of each school share similar benefits. The evidence showed that non-tenure-track wages and benefits were set in their appointment and reappointment letters. Each school maintains its own appointment and reappointment letter templates and has different letters for non-tenure-track faculty as opposed to tenured or tenure-track letters. Some benefit policies are set at the University-level for each employee. Health insurance, for example, is available to all of the University's full-time faculty, including full-time non-tenure-track faculty.

However, the evidence shows that each school has some amount of flexibility in granting benefits. For example, there was testimony from non-tenure-track professors in the Peabody College of Education and Human Development and the College of Arts and Science that they were able to keep their health insurance when the Employer assigns them a lesser course load and are only part-time. Similarly, whether or not the Employer makes sabbaticals to non-tenure-track faculty is set at the school level. The evidence shows that full-time non-tenure-track faculty at the Blair School of Music, the Peabody College of Education and Human Development, and the Divinity School are eligible for sabbatical, while all non-tenure-track College of Arts and Science faculty are ineligible.

Full-time Blair School of Music faculty also have the unique benefits of \$1,000 per year for travel for academic purposes and half-price music instruction for their children.

The Employer refused to provide evidence concerning the wages of its employees, including redacting that information from exhibits it offered into evidence. By withholding this evidence from the record, I am unable to determine whether non-tenure-track faculty are paid more or less based on school assignment or any other factor or whether they are paid less than tenured and tenure-track faculty. Similarly, non-tenure-track faculty at one school may enjoy different benefits from non-tenure-track faculty at other schools. In light of the above, and the record as a whole, I find that this factor, at least as to benefits, favors including all non-tenure-track faculty in separate units based on primary school appointment.

3. Other Terms and Conditions of Employment

Non-tenure-track faculty at the College of Arts and Science, the Peabody College of Education and Human Development, the Blair School of Music, and the Divinity School have unique terms and conditions that set them apart from one another. As discussed above, faculty at each school work in generally the same areas of campus, distinct from the faculty at other schools. The Divinity School and the Blair School of Music each have their own facilities that house faculty offices and classrooms. The Peabody College of Education and Human Development and the College of Arts and Science each have their own set of buildings that house its faculty's offices and classrooms. The evidence further shows that, with the exception of their assigned classes, each faculty member is responsible for setting his or her own work hours, including office hours. Furthermore, each school maintains its own unique set of employee policies and procedures concerning terms and conditions of employment. The Peabody College and the College of Arts and Science each have their own constitution, and the Blair School of Music and the Divinity School each maintain their own employee handbook. The Divinity School also has a unique term of

employment requiring that all full-time faculty, including non-tenure-track, serve on a school-level committee. The Peabody College of Education and Human Development, Blair School of Music, and the College of Arts and Science do not require that faculty serve on any committees.⁹

In light of the above, and the record as a whole, I find that this factor favors including all non-tenure-track faculty in separate units based on primary school appointment.

Application of the community of interest factors overwhelming demonstrates that separate units composed of full-time and part-time faculty at each of the petitioned-for unit's component schools is appropriate. Accordingly, I reject Petitioner's petitioned-for unit as it is not readily identifiable as a group. However, by splitting the petitioned-for unit into non-tenure-track faculty units at four of its component schools, I find that those units are each readily identifiable as a group and each unit shares a community of interest.

c. VOTES SUBJECT TO CHALLENGE

At the hearing and in their briefs, the parties also argued over the inclusion of the University's Postdoctoral Fellows. The Employer argues that they should be excluded as they are not faculty and do not share a community of interest with the petitioned-for unit, and Petitioner's position is that they should be included. While there was some argument over this issue, there was very little actual evidence offered by either side. The evidence shows that the University has approximately 328 Postdoctoral Fellows, but only between one and three of them actually teach classes and would be eligible for inclusion in the unit. No evidence was offered from which I can determine whether these Fellows share a community of interest with the unit faculty. Since this is

⁹ There was testimony that service on a committees is expected at Peabody, Blair, and Arts and Science, but that faculty can and do decline to serve without any consequences. As such, I find that committee service at these three schools is aspirational rather than an actual requirement for continued employment.

such a small number of the total petitioned-for employees, I am directing that **Postdoctoral Fellows** shall vote subject to challenge in the unit in which they teach.

As discussed in detail above, I am also directing that **non-tenure-track Associate Professors, non-tenure-track Assistant Professors, and non-tenure-track Professors in the College of Arts and Science, the Blair School of Music, and the Divinity School units** shall vote subject to challenge in their respective units. Finally, as discussed above, the **three non-administrative non-tenure-track faculty who sit on the Peabody College of Education and Human Development’s Committee on Academic Standards and Procedures** shall vote subject to challenge in the Peabody College of Education and Human Development unit.

III. APPROPRIATE UNITS

Based on the foregoing and the entire record, I am directing separate elections in the following appropriate units:

The College of Arts and Science Unit

Included: All full-time and part-time non-tenure-track faculty employed by Vanderbilt University with a primary appointment in the **College of Arts and Science**.

Excluded: All faculty of other Schools and Colleges, all tenured faculty, tenure-track faculty, emeritus faculty, research faculty who are not teaching courses, adjunct faculty, clinical faculty, all administrators (including deans, directors, provosts, and chairs who may have teaching assignments); faculty who are paid by entities other than Vanderbilt University (including governments, and other organizations), visiting faculty paid by their home institutions, athletic coaches, all other employees employed by the University, including those who teach a class or course and are separately compensated for such teaching; managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

The Peabody College of Education and Development Unit

Included: All full-time and part-time non-tenure-track faculty employed by Vanderbilt University with a primary appointment in the **Peabody College of Education and Development**.

Excluded: All faculty of other Schools and Colleges, all tenured faculty, tenure-track faculty, emeritus faculty, research faculty who are not teaching courses, adjunct faculty, clinical faculty, all administrators (including deans, directors, provosts, and chairs who may have teaching assignments); faculty who are paid by entities other than Vanderbilt University (including governments, and other organizations), visiting faculty paid by their home institutions, athletic coaches, all other employees employed by the University, including those who teach a class or course and are separately compensated for such teaching; managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

The Blair School of Music Unit

Included: All full-time and part-time non-tenure-track faculty employed by Vanderbilt University with a primary appointment in the **Blair School of Music**.

Excluded: All faculty of other Schools and Colleges, all tenured faculty, tenure-track faculty, emeritus faculty, research faculty who are not teaching courses, adjunct faculty, clinical faculty, all administrators (including deans, directors, provosts, and chairs who may have teaching assignments); faculty who are paid by entities other than Vanderbilt University (including governments, and other organizations), visiting faculty paid by their home institutions, athletic coaches, all other employees employed by the University, including those who teach a class or course and are separately compensated for such teaching; managers, confidential employees, office clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

The Divinity School Unit

Included: All full-time and part-time non-tenure-track faculty employed by Vanderbilt University with a primary appointment in the **Divinity School**.

Excluded: All faculty of other Schools and Colleges, all tenured faculty, tenure-track faculty, emeritus faculty, research faculty who are not teaching courses, adjunct faculty, clinical faculty, all administrators (including deans, directors, provosts, and chairs who may have teaching assignments); faculty who are paid by entities other than Vanderbilt University (including governments, and other organizations), visiting faculty paid by their home institutions, athletic coaches, all other employees employed by the University, including those who teach a class or course and are separately compensated for such teaching; managers, confidential employees, office

clerical employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

IV. SHOWING OF INTEREST

Since I found that the petitioned-for unit is inappropriate for collective-bargaining purposes, and instead have found alternate units appropriate, direction of these elections is conditioned on Petitioner timely filing a separate showing of interest for each unit. Petitioner shall provide the Regional office with its original showing of interest in each unit no later than two days after this decision issues.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Service Employees International Union Local 205.

A. Election Details

Both parties were given an opportunity to argue their positions as to the election method which should be used during the hearing and were also advised they could do so in their post-hearing briefs. The Employer argued strenuously that the Region should direct a manual election because the Board favors manual elections where feasible. The Employer's position is that the Region should conduct the election in the Central Library on Monday from 10:00 a.m. to 1:00 p.m.; on Tuesday from 10:00 a.m. to 1:00 p.m. and from 3:00 p.m. to 7:00 p.m.; and on Wednesday from 3:00 p.m. to 7:00 p.m. If necessary, the Employer also contends that additional voting sites in the Blair School of Music and Peabody College of Education and Human Development would be appropriate.

Petitioner, on the other hand, argued that a mail ballot has now become standard in faculty elections and is appropriate here due to the petitioned-for faculty's wildly divergent work schedules. The record shows that many of the petitioned-for faculty are adjuncts with primary employment outside of the University. These employees may be unable to attend a manual election held during their "day job" working hours. Testimony revealed that some of these faculty members teach only on Saturdays for half of a semester; some teach only one day a week; and some teach only twice a week.

Having reviewed the parties' positions and submissions on the record, on balance I conclude that holding a **mail ballot** election would be the best means of conducting the election in this matter. Neither party was either able or willing to put into the record specific schedules that showed when unit faculty teach classes and would be available on campus to vote. The little evidence of employee schedules in the record support the conclusion that unit faculty work wildly divergent schedules and, as to office hours, establish their own schedules. Attempting to hold a manual election without sufficient information on dates and times when all or substantially all of the employees in the appropriate units will be on the campus and available to vote, would leave to chance whether the times and dates selected for a manual election will enfranchise each employee in the units. Holding elections at multiple sites at the same time could also result in numerous challenged ballots as a result of faculty (including those who are not eligible) voting or attempting to vote at locations other than the one to which they might be assigned. A mail ballot on the other hand, while taking somewhat more time, would be targeted to the actual voters in the unit and to the addresses the employees have provided the Employer – thereby ensuring to the extent possible that each voter will receive a ballot and have the opportunity to vote.

Holding the election by mail ballot also mitigates the issue of holding the election after the end of the spring term. In its brief, the Employer argued that since the spring term ends on April 24, 2017, the election should be delayed until after the fall term begins on August 28, 2017, some six months after the petition was originally filed. Such a delay is unacceptable, especially when a mail ballot election alleviates that concern, and as discussed above, is otherwise justified.

In light of the above, the election will be conducted by United States mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 2:00 P.M. on **Monday, May 15, 2017**, ballots will be mailed to voters from the National Labor Relations Board, Region 10, 233 Peachtree Street, N.E., Harris Tower Suite 1000, Atlanta, Georgia, 30303-1531. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by May 22, 2017, should communicate immediately with the National Labor Relations Board by either calling the Region 10 Office at 404-331-2896 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Nashville Resident Office on **Tuesday, June 6, 2017**, at 2pm. In order to be valid and counted, the returned ballots must be received in the Nashville Resident Office, 810 Broadway, Suite 302, Nashville, Tennessee, 37203-3859, prior to the counting of the ballots.

B. Voting Eligibility

During the hearing, the parties stipulated to a voter edibility should be limited to those petitioned-for faculty who are currently teaching at least one class. Petitioner's position is that, if the

election occurs after the last day of classes on April 24, 2017, the eligibility formula should include a one-semester “look back” period, so as to include faculty teaching at least one class during the Spring 2017 semester, and not merely the small fraction of the total faculty who teach during the summer.

The goal in crafting an appropriate eligibility formula is to “strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment.” *Columbia University*, 364 NLRB No. 90, slip. op. at 21-22 (2016), citing *Steiny & Co.*, 308 NLRB 1323, 1325 (1992); and *Trump Taj Mahal Casino*, 306 NLRB 294 (1992). The Board noted that, as here, “there are employees in the unit who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment. *Id.* at 22.

I find that Petitioner’s proposal of a “look back” eligibility formula that includes unit employees teaching classes during the Spring 2017 strikes a reasonable balance between including only those employees with a connection to the unit without disenfranchising intermittently employed adjunct and other non-tenure-track faculty. Based on the evidence adduced at the hearing and the positions of the parties, I am directing an election in the units described above according to the following eligibility formula:

All unit employees who are currently teaching at least one class, or taught at least one class during the Spring 2017 semester.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have

retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board’s challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board’s Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include in a separate section of that list the same information for those individuals who, according to this direction of election, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 5, 2017**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will be issued in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily

communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least three full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the

request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: May 3, 2017

A handwritten signature in black ink, appearing to read 'L. Henderson', is written over a horizontal line.

LISA Y. HENDERSON
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 10
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